No. 89-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, GOVERNOR OF THE STATE OF MINNESOTA, *et al.*,
Appellants,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND

COMES NOW the Firearms Civil Rights Legal Defense Fund, by counsel, pursuant to Rule 37 of the Supreme Court Rules, and hereby moves to file an amicus curiae brief, and in support thereof shows the following:

The interest for the amicus is that the Firearms Civil Rights Legal Defense Fund is a non-profit organization established under Section 501(c)(3) of the Internal Revenue Code to litigate on matters affecting the Second Amendment to the Constitution. It has undertaken substantial historical research on the militia and the intent of the Framers of the Constitution regarding the militia. A primary issue in this case is the meaning of the term "well regulated militia" as used in the Second Amendment and the simple term "militia" as used in Art. I, Section 8 of the Constitution.

A brief of amicus curiae is desirable to alert the court to the intent of the Founding Fathers in framing the militia and army clauses set forth in the Constitution and Bill of Rights. The writer of the brief has published a book and numerous law review articles on the subject, and will provide original research sources which may not be otherwise avaliable to the parties or the court. A similar amicus curiae brief was filed by this counsel in the court below and in the related case of *Dukakis v. U.S. Department of Defense*, U.S. Court of Appeals for the First Circuit, No. 88-1510.

No objection has been received from the appellants, Rudy Perpich *et al.* Counsel for amicus requested from appellants in a letter dated February 8, 1990, for written consent to file an amicus brief. Written consent will be forwarded immediately upon receipt. The Solicitor General on February 13, 1990, consented to the filing of the amicus curiae brief. The written consent is filed separately. The deadline for the reply brief of the appellants has not passed, and no party will be prejudiced by the filing of this brief. Amicus will urge that the result in the court below be affirmed.

Copies of the brief are hereby conditionally filed.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in its motion for leave to file amicus curiae brief and are adopted herein.

SUMMARY OF ARGUMENT

The term "militia" was understood by the framers to mean the armed populace at large. In contradistinction, the framers considered a select militia, like the present National Guard, to be part of the standing army. Since the National Guard is a component of the standing army, and is not the broad based militia as the framers in-

tended, the governor may not object to it being trained in a foreign nation. Therefore, the result reached in *Perpich v. Department of Defense*, 880 F.2d 11 (8th Cir. 1989) (en banc), is correct.

ARGUMENT

I. THE FRAMERS INTENDED THE MILITIA TO BE COMPOSED OF THE POPULACE AT LARGE, AND CONSIDERED A SELECT MILITIA LIKE THE NATIONAL GUARD TO BE PART OF THE STANDING ARMY

A. The Text of the Constitution

As envisioned in the Constitution, the army and the militia are distinct bodies. Art. I, Sec. 8 empowers Congress "to declare War, . . . to raise and support Armies . . . [and] to make Rules for the Government and Regulation of the land and naval Forces. . ." Congress is also empowered:

> To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . .

Art. II, Sec. 2 provides: "The President shall be the commander in chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . . ." This provision makes clear that there is no national militia, but only a "Militia of the several States." Similarly, the Fifth Amendment provides for grand jury indictment "except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger . . . ." Thus, the militia of the several states always retains its status as such, even though it may be called in the "actual service" of the United States for specified domestic purposes.

The Second Amendment guarantees: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The right is guaranteed to "the people," including the militia at all times, and is not limited to "the Militia, when in actual service in time of War or public danger," terms found in the Fifth Amendment. The Second Amendment presupposes that an armed populace encourages a well regulated militia and secures a free state.

Finally, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The power to raise armies is delegated to the United States and prohibited to the states, while the power over the militia is reserved exclusively to the states, except as delegated to Congress in Art. I, Sec. 8.

B. Experiences of the Revolution

From the outset of the Revolution in 1775 through the adoption of the Militia Act of 1792, the essential character of the well regulated militia espoused by the Founding Fathers was twofold: (1) it was composed of the people at large, rather than a select group, and (2) its members provided and kept their own arms. By contrast, a small body of trained professionals whose arms were provided by government and which constituted a permanent military establishment was known as a select militia or a standing army. While an Army may be necessary for the common defense, military despotism would be deterred by the constitutional militia composed of the armed populace.

"A well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen," terms used by George Mason in 1775, exemplify the Founders' conception of the militia. 1 THE PAPERS OF GEORGE MASON 215 (R. Rutland ed. 1970). Most of the colonies used similar language when they resolved that the inhabitants must arm themselves and enroll in the militia. *E.g.*, 1 P. Force, AMERICAN ARCHIVES 1022, 1032 (1837) (Delaware, Maryland). The Virginia Declaration of Rights of 1776, Art. XIII, provided "that a well regulated Militia, composed of the body of the People, trained to Arms, is the proper, natural, and safe Defence of a free State . . . ."

C. The Constitutional Convention of 1787

The principles of the Revolution were remembered at the Constitutional Convention of 1787. The members of the convention regarded the militia as an entity of the respective states which would be subject to federal standards, but would be under federal authority only when called out for specified domestic purposes.

To reduce the need for a standing army, George Mason proposed a power "to make laws for the regulation and discipline of the militia of the several states. . . ." He considered uniformity as necessary in the regulation of the militia, throughout the Union." 3 J. Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 443 (1845).[1]

[1] Similarly, Oliver Ellsworth proposed that "the militia should have the same arms and exercise, and be under rules established by the general government when in actual service of the United States . . . ." *Id.* He contended that "the whole authority over the militia ought by no means to be taken away from the states, whose consequence would pine away to nothing after such a sacrifice of power." *Id.* Finally, Ellsworth "considered the idea of a select militia as impracticable; and if it were not, it would be followed by a ruinous declension of the great body of the militia." *Id.* at 444.

Roger Sherman held that "the states might want their militia for defense against invasions and insurrections, and for enforcing obedience to their laws." *Id.* at 445. Mason agreed, moving that the general power would not extend to "such part of the militia as might be required by the states for their own use." *Id.* Mason's proposals were then referred to committee.

When reported back to the convention, the Militia Clause was worded almost exactly as finally adopted in the Constitution. *Id.* at 464. The following explanation ensued:

> MR. KING, by way of explanation, said, that by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying the kind, size, and calibre of arms—and by *disciplining*, prescribing the manual exercise, evolutions, & . . .
>
> MR. MADISON observed, that "arming," as explained, did not extend to furnishing arms; nor the term "*disciplining*," to penalties, and courts martial for enforcing them. *Id.* at 464-65.

Madison summed up the debate by remarking that "as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia." *Id.* at 466-67. The limited power of Congress thus extends mainly to the adoption of uniform standards for arms and exercises, and to governing the militia when called into federal service for specified purposes.

D. The Debate Between Federalists and Anti-Federalists

The nature of the militia and the army, and the powers of Congress vis-a-vis the states and the people, were fully exposited in the debate between the federalists and anti-federalists. Madison stated it best in *The Federalist* No. 46:

> Let a regular army fully equal to the resources of the country be formed, and let it be entirely at the

> devotion of the Federal Government; still, . . . the State governments, with the people on their side, would be able to repel the danger. . . . To these [armed forces] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. . . . Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached and by which the militia officers are appointed forms a barrier against the enterprises of ambition more insurmountable than any which a simple government of any form can admit of.

Similarly, in *The Federalist*, No. 29, Alexander Hamilton argued:

> Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped.
>
> . . . This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.

Tench Coxe, a friend of Madison and a prominent Federalist, argued:

> THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistable. Who are the

> militia? are they not ourselves. . . . Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) at 1778-1780 (1976).

Richard Henry Lee ably articulated anti-federalist demands which resulted in the Bill of Rights. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53 (1788). Lee explained regarding the militia:

> A militia, when properly formed, are in fact the people themselves, and render troops in a great measure unnecessary. . . . [T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include . . . all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided. *Id.* at 169.

In a pasage which strikingly anticipates the adoption of the Second Amendment, Lee stated:

> These [select] corps, not much unlike regular troops, will ever produce an inattention to the general militia; . . . whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle. . . . *Id.* at 170.

E. The State Ratifying Conventions

In the state ratifying conventions, federalists and antifederalists alike stressed the importance of the mil-

itia, but disagreed over whether a bill of rights was necessary. John Smilie warned in the Pennsylvania convention: "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all. Where a select militia is formed; the people in general may be disarmed." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (M. Jensen ed. 1976). By contrast, James Wilson argued that the power of Congress was intended to establish a uniformity of arms, not to actually furnish arms (and thus determine who would be armed):

> Men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp. . . . If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States. 2 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 521 (Philadelphia 1836).

In the Virginia convention, James Madison argued: "Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: these are the only cases wherein they can interfere with the militia . . . ." 3 J. Elliott, DEBATES IN THE SEVERAL STATE CONVENTIONS 90 (Philadelphia 1836). Madison assumed that the militia consisted of the whole people:

> If resistance should be made to the execution of the laws . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. . . . If insurrections should arise, or invasion should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. *Id.* at 378.[9]

[9] Madison also opined that the states retained broad powers over the militia. "I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive." *Id.* at 382. Similarly, John Marshall observed "that the power of governing the militia was not vested in the states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been." *Id.* at 421.

George Mason asked, "who are the militia, if they be not the *people* of this country . . .? I ask, Who are the militia? They consist now of the whole people, except a few public officers." Ideally, the militia will always "consist of all classes, high and low, and rich and poor . . . ." *Id.* at 425-26.

Based on the above and on debate concerning the right to bear arms, the Virginia convention adopted a proposed Bill of Rights including the following: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state . . . ." *Id.* at 659. The New York convention recommended a similar provision which referred to the militia as "the body of the people capable of bearing arms." *Id.*, 1, at 327-28.

Proposals for arms guarantees surfaced in seven state conventions. A survey of these seven proposals indicates that the framers of the Second Amendment had two separate objectives in mind. The first purpose was to recognize in general terms the importance of a militia to a free state. The second purpose was to guarantee a right to keep and bear arms for all traditional purposes, including self-defense. (*Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846), illustrates this early understanding.) The second purpose was plain in the Pennsylvania, Massachusetts, and New Hampshire conventions. The proposals from Virginia, New York, North Carolina, and Rhode Island blended the militia purpose with the pur-

pose to guarantee to the people the right to keep and bear arms.

F. The Adoption of the Second Amendment

James Madison first reviewed proposals from the state conventions before he proposed to the House of Representatives a bill of rights that included the following: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONGRESS 434 (June 8, 1789).[8]

The House Committee on Amendments reported Madison's proposal in this form: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." 1 ANNALS OF CONGRESS 750 (Aug. 17, 1789). In debate that followed, Elbridge Gerry objected to the last phase because "Congress can declare who are those religiously scrupulous and prevent them from bearing arms." He added:

> What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Con-

[8] Ten days later, Tench Coxe published his "Remarks on the First Part of the Amendments," *Federal Gazette & Philadelphia Evening Post*, June 18, 1789, at 2, col. 1, which explained the above as follows: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." Madison praised the article. 12 MADISON PAPERS 239-240, 257 (1979).

> gress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. *Id.*

Furthermore, on Wednesday, September 9, 1789, a motion in the Senate to insert "for the common defence" next to the words "bear arms" was defeated. JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (Gales & Seaton 1820). Thus, an effort to restrict the right was defeated.

The view that the final language for the Second Amendment was a compromise to satisfy all competing objectives of the framers is bolstered by the recent discovery in James Madison's papers of an early draft of the Bill of Rights, in Roger Sherman's handwriting, which provided for a militia but no right to keep and bear arms. N.Y. Times, July 29, 1987, p. A1. The Framers' ultimate decision not to adopt the Sherman proposal indicates that they felt it was inadequate.

As adopted, the Second Amendment was devoid of any language that would allow Congress to disarm law-abiding persons. It clearly expresses the idea that a well regulated militia is composed of the armed populace. The Second Amendment intended "for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. History 599, 614 (1982). See also Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637 (1989); Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. Law & Politics 1 (1987); Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987); S.

Halbrook, THAT EVERY MAN BE ARMED 76 (Univ. N. Mex. Press 1984); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285 (1983); Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okl. L. Rev. 65 (1983); Sprecher, *The Lost Amendment*, 51 Am. Bar Assn. J. 554 & 665 (1965) (2 parts). The Addendum contains a list of scholarly literature on the Second Amendment.

G. The First Federal Militia Act

The federal Militia Act of May 8, 1792 required every "free able bodied white male citizen" to provide himself with a good musket or firelock . . . ." In House debate, Rep. Parker objected that this would be impractical for poor persons, who should thus be armed at federal expense. 2 ANNALS OF CONGRESS 1804 (Dec. 16, 1790). Rep. Sherman argued that "the people of America would never consent to be deprived of the privilege of carrying arms." *Id.* at 1805. He explained:

> What relates to arming and disciplining means nothing more than a general regulation in respect to the arms and accoutrements. There are so few freemen in the United States who are not able to provide themselves with arms and accoutrements, that any provision on the part of the United States is unnecessary and improper. He had no doubt that the people, if left to themselves, would provide such arms as are necesary, without inconvenience or complaint; but if they are furnished by the United States, the public arsenals would soon be exhausted . . . *Id.* at 1806.

The ultimate objection to a government-armed populace was expressed by Rep. Wadsworth: "Is there a man in this House who would wish to see so large a proportion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them?" *Id.* at 1809.

Rep. Fitzsimons moved to strike the words "provide himself" and amend the bill to read that every citizen "shall be provided" with arms. Madison and others objected that this "would leave it optional with the States, or individuals, whether the militia shall be armed or not." "This motion was lost by a great majority." *Id.* at 1809. Thus, the first Congress to pass legislation under the Militia Clause, saw the militia as the body of the citizens, who kept their own arms.

II. APPLICATION OF THE TEXT AND FRAMERS' INTENT TO THE STATUTORY SCHEME

According to the text of the Constitution and Bill of Rights as amplified by the intent of the framers, the following factors are associated with the term "militia":

1. Consists of "the people," i.e., all able bodied persons capable of bearing arms.
2. Its members are civilians primarily.
3. They provide their own arms.
4. They privately own these arms.
5. They keep these arms in their homes.
6. Their keeping and bearing of arms is not limited to actual militia service.
7. Its federal function is to execute the laws, suppress insurrections, and repel invasions.

By contrast, the following are characteristics of a standing army, including a select militia:

1. Consists of a distinct and select group, full or part time.
2. It is a permanent military establishment.
3. The federal government provides the arms.
4. The federal government owns the arms.
5. The arms are secured in armories and are subject to federal recall.

6. The arms are borne only in professional military training and service.

7. Its function is war.

10 U.S.C. Sec. 311 provides that "the militia of the United States consists of all able-bodied males" ages 17 through 44, including the "organized militia" (National Guard and Naval Militia) and "unorganized milita" (all others). The following further definitions are provided in 10 U.S.C. Sec. 101:

> (9) "National Guard" means the Army National Guard and the Air National Guard.
>
> (10) "Army National Guard" means that part of the organized militia of the several States . . . , active and inactive, that-
>
> (A) is a land force;
>
> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
>
> (C) is organized, armed, and equipped wholly or partly at Federal expense; and
>
> (D) is federally recognized.
>
> (11) "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

Finally, 10 U.S.C. Sec. 672(b) and (d) provides as to the Army National Guard of the United States that members or units "may not be ordered to active duty under this subsection without the consent of the governor of the State" involved. Recently adopted Sec. 672(f) limits the consent required, leading to the present controversy. However, if the Guard is a component of the armed forces, then the governor may not object to its being trained abroad; only if the Guard is part

of the militia as constitutionally defined may the governor object.[4]

In recognizing the fundamental distinction between the army and the militia, the Constitution does not anticipate that the organized militia will be a reserve component of the Army. Although the statute may declare the National Guard to be the organized militia of the several states, that does not make it so under the Constitution, any more than would a statute that declared soldiers under active duty to be the militia. Further, the statute declares the Army National Guard of the United States to be a reserve component of the Army, clearly distinguishing it from the constitutional militia.

When the National Guard is not on active duty as part of the Army, it ostensibly has a hybrid status as a state militia. However, its full-time status as a reserve component of the Army, and its strong dependence on the federal government, make it far more akin to a select militia which is really part of the Army, than the constitutional militia of the respective states envisioned by the framers. The historical development of the militia and the Guard exhibits a consistent parting of the ways between the two.

The only detailed opinion by the U.S. Supreme Court on the nature of the militia and the Second Amendment, *United States v. Miller*, 307 U.S. 174 (1939), does not even mention the National Guard. *Miller* concluded:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of the Colonies and States, and

---

[4]"This is not the only area in which the Constitution requires a distinction between the armed forces and the militia. The armed forces may engage in war, but may not be called out to enforce the laws, a function reserved to the militia under Art. I, Sec. 8. *E.g.*, 18 U.S.C. Sec. 1385 punishes "Whoever, . . . willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws . . . ."

> the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. *Id.* at 178-179.[5]

Recent scholarship further contrasts the National Guard from the militia as originally intended. *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess. at 7 (1982) states:

> In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. . . . This statute, incidentally remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can be little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. . . . From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

After the Civil War, the militia as envisioned in the Constitution came to be relied upon less and less. Wiener, *The Militia Clause of the Constitution*, 54 Har. L. Rev. 181, 191 (1940) states: "The militia contemplated by the

[5] *Maryland v. United States*, 381 U.S. 41, 46 (1965) held: "The National Guard is the 'modern Militia reserved to the States. . . .'" In view of *Miller* and the federal statutory provisions, it is clear that, to the degree *Maryland* goes beyond holding that the National Guard is the "*organized* militia"—which is only as far as the Court needed to go to decide the case—the statement is dictum.

Act of 1792, that is, the whole body of the people, virtually ceased to exist, and the States relied more and more upon select bodies of men . . . who became known as National Guards. The Guards devoted itself . . . with distressing regularity, to strike duty. . .".[6] Even so, the Guard was not part of the federal Army at that time, and was defined by state law as a part of the general militia of the people at large.[7]

The Dick Act of 1903 began the transformation of the Guard from part of the militia of the states to a component of the Army. S. Ambrose, THE MILITARY AND AMERICAN SOCIETY 245 (1972) states:

> The Dick Act almost completely negated the original purpose of the militia, for the Founding Fathers saw the militia as a liberal agency that would act in

[6] M. Derthick, THE NATIONAL GUARD IN POLITICS 16-17 (1965) states:

> Both observers in the 1880's and subsequent students have identified the labor riots of 1877 as the cause of the Guard's sudden growth. . . . Development of the Guard began and proceeded fastest in the populous, industrial states of the North. . . .
>
> The Guards received substantial private funds from wealthy businessmen. . . . Officers of the Guard in all of the states appear to have been business and professional men, representative of the "better classes."

Derthick further notes that in the years after 1920, "the Guard served the interests of business in conflicts with labor. It saw frequent service in strikes. . . . It was attacked as the private army of big business." *Id.* at 51-52. This may explain the disuse of the people at large as militia.

[7] *State v. Wagener*, 77 N.W. 424, 425 (Minn. 1898) states: "Under our Military Code, the active militia or national guard . . . come from the body of the militia of the state. . . ." *Accord, State v. Grayston*, 163 S.W.2d 335, 337 (Mo. 1942) ("the term 'militia' was not used as restricted to the National Guard" but includes "every able-bodied citizen").

Current state constitutional and statutory provisions relating to the militia are listed in the Addendum to this brief.

> defense of individual and local liberty against the power of the Federal Government. The Founding Fathers, in fact, reflecting their deep suspicion of standing armies, went to great lengths to insure that the Federal Government would not have a monopoly on violence. On an individual level, they guaranteed citizens the right to bear arms; on the organized level, they encouraged the development of state militia units in order to provide a counter-power to the U.S. Army.

The Act of June 15, 1933, 48 Stat. 153, 155 created the National Guard of the United States as a reserve component of the U.S. Army. This enactment was pursuant to the power to "raise and support armies," not the Militia Clause. H.R. Rpt. No. 141, 73rd Cong., 1st Sess. at 2-5 (1933). As stated in *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution, supra* at 11:

> The "militia" itself referred to a concept of a universally armed people, not to any specifically organized unit. When the framers deferred to the equivalent of our National Guard, they uniformly used the term "select militia" and distinguished this from "militia". Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia.

That the National Guard is not the "Militia" referred to in the second amendment is even clearer today. Congress has organized the National Guard under its power to "raise and support armies" and not its power to "Provide for organizing, arming and disciplining the Militia". This Congress chose to do in the interests of organizing reserve military units which were not limited in deployment by the strictures of our power over the constitutional militia, which can be called forth only "to execute the laws of the Union, suppress insurrections and repel

> invasions." The modern National Guard was specifically intended to avoid status as the constitutional militia, a distinction recognized by 10 U.S.C. Section 311(a).[8]

Since the Army National Guard of the United States is a component of the Army, the states have no authority over it whatever, and the consent of a state governor for training exercises abroad is not constitutionally required. Consequently, Art. I, Section 8, Cl. 16, which reserves to the states (without exception) "the authority of training the militia" is irrelevant here.

Both federal and state statutes declare that the very same force which is a component of the Army, nonetheless constitutes the organized militia of the states. However, the training of Guard units abroad has been undertaken under the Army and Necessary and Proper clauses, not under clause 16 which provides that Congress may govern such part of the militia "as may be employed in the service of the United States." Moreover, the Constitution distinguishes the Army from the Militia, and does not anticipate that they may be one and the same. The characteristics of the Guard as part of the Army clearly predominate over its characteristics as part of the militia of the respective states. Taken as a whole, the National Guard is not the constitutional militia as intended by the

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[8] E. Colby and J. Glass, *The Legal Status of the National Guard*, 29 Vill.L.Rev. 839, 840 (1943) states:

> A separation of the National Guard from the militia idea is the first and most necessary step. The confusion between these two has been the cause of much error. . . . By [1933], although there had long been a National Guard, there was, practically speaking, no militia.

The article concluded "that the National Guardsmen are actually federal troops in every sense of the word." *Id.* at 852.

framers.[9] Consequently, the Militia Clause has no application here.

CONCLUSION

The Court should affirm the decision of the Court of Appeals, but on such grounds as more precisely identifies the constitutional status of the National Guard as a component of the U.S. Army and not the Militia, which consists of the people at large.

Respectfully submitted,

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[9] During both world wars, when the National Guard units were mobilized, the states had to rely on self-armed citizens and to organize their own state protective forces for defense from invasion and against sabotage, and to keep order. *E.g.*, M. Schlegel, VIRGINIA ON GUARD: CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR (1949); U.S. HOME DEFENSE FORCES STUDY at 58 (Office of Sec. of Defense, 1981); Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okl. City Univ. L. Rev. 177, 197, 233-35 (1982). The organization of state defense forces for militia needs has been the subject of proposed legislation. *E.g.*, H.R. 2581 (Traficant, June 2, 1987); H.R. 3068 (Skelton, July 30, 1987).

APPENDICES

APPENDIX A

LITERATURE ON RIGHT TO BEAR ARMS

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McClure, *Firearms And Federalism*, 7 Idaho L. Rev. 197 (1970)

Levine & Saxe, *The Second Amendment: The Right To Bear Arms*, 7 Houston L. Rev. 1 (1969)

Olds, *The Second Amendment And The Right To Keep And Bear Arms*, 46 Mich. St. Bar J. 15 (Oct. 1967)

Comment, *The Right To Keep And Bear Arms; A Necessary Constitutional Guarantee Or An Outmoded Provision Of The Bill of Rights?*, 31 Albany L. Rev. 74 (1967)

Sprecher, *The Lost Amendment*, 51 Am. Bar Assn. J. 554 & 665 (2 parts) (1965)

Hays, *The Right To Bear Arms, A Study In Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960)

APPENDIX B

STATE MILITIA PROVISIONS

	STATE CONSTITUTION	STATUTES
Alabama	Const. of 1875 Art. 12 § 1 (const. of 1901 Art. 15) *(LP)	Alabama Code 1975 § 31-2-2
Alaska	*nothing*	Alaska Statutes 1978 Title 26 § 2605.010
Arizona	Const. (from stat. 1956) Article 16 § 1	Arizona Rev. Statutes Ann. 1956 Title 26 Article 2 § 26-121
Arkansas	Const. of 1874 Article 11 § 1	Arkansas Stat. Ann. 1947 § 11-102
California	Const. of 1879 as amended Article 8 § 1 (LP)	West's Cal. Code Ann. 1955 § 121-122
Colorado	Const. of 1876 Art. 17 § 1	*nothing*
Connecticut	*nothing*	Conn. Gen. Stat. Ann. (1975) Chapter 504 § 27-1, § 27-2
Delaware	*nothing*	Del. Code Ann. Rev. 1974 Title 20 ** *nothing*
District of Columbia	*nothing*	D.C. Code § 39-101
Florida	Const. Article 10 § 2	West's Fla. Stat. Ann. 1975 Title 16 ch. 250 § 250-02
Georgia	Const. Art. 3 § 11 ¶ 1 (*Gen. Assem.)	Official Code of Ga. Ann. 1971 § 38-2-3
Hawaii	*nothing*	Hawaii Rev. Statutes 1976 Title 10 ch. 121 § 121-1
Idaho	Const. Art. 14 § 1	Idaho Code § 46-102
Illinois	Const. of 1970 Art. 12 § 1	Smith-Hurd Ill. Ann. Stat. (1953) Ch. 29 Art. 1 § 1

Indiana	Const. Art. 12 § 1	Burns Ind. Stat. Ann. Title 10 Art. 3 ** *nothing*
Iowa	Const. of 1857 Art. 6 § 1	*nothing*
Kansas	Const. Art. 8 § 1	Kansas Stat. Ann. 1976 Ch. 48 Art. 1 § 48-101
Kentucky	Const. § 219	Kentucky Stat. Ann. 1980 Title 5 Ch. 37 § 37.170
Louisiana	*nothing*	West's La. Rev. Stat. (1975) Title 29 Ch. 1 § 3
Maine	Const. Art. 7 § 4	Maine Rev. Stat. Ann. Title 37-A Ch. 9 § 37-A-251
Maryland	*nothing*	Ann. Code of Md. Art. 65 § 1
Massachusetts	*nothing*	Mass. Gen. Lews Ann. Title 5 Ch. 33 § 2
Michigan	Const. of 1963 Art. 3 § 4 (*LP)	Mich. Compiled Laws Ann. § 32.1
Minnesota	Const. of 1974 Art. 13 § 1 (*LP)	Minnesota Stat. Ann. § 190.06
Mississippi	Const. of 1963 Art. 9 § 214	Miss. Code Ann. 1972 Chapter 5 § 33-5-1
Missouri	Const. of 1945 Art. 3 § 46 (*Gen. Assem.)	Vernon's Ann. Mo. Stat. 1969 Title 5 ch. 41 § 41.050
Montana	Const. Art. 6 § 13 ("military force shall consist of all able bodied citizens of state except those exempt by law")	Mont. Code Ann. Title 10 Ch. 1 ** *nothing*
Nebraska	Const. Art. 14 § 1 (*LP)	Rev. Stats. of Neb. Ch. 55 § 55-106
Nevada	Const. Art. 12 § 1 (*LP)	Nev. Rev. Stat. ch. 412 § 412.026

New Hampshire	Const. Art. 24 *nothing*	N. Hamp. Rev. Stat. Ann. (1977) Title 8 Ch. 110 § 110-A:1
New Jersey	Const. of 1947 Art. 5 § 3 ¶ 1 (*LP)	N.J. Stat. Ann. (1968) § 38A:1-2
New Mexico	Const. Art. 18 § 1	N.Mex. Rev. Stat. (1978) § 20-2-2
New York	Const. Art. 12 § 1	McKinney's Con. Laws of N.Y. Ann. Book 35 Art. 1 § 2
North Carolina	*nothing*	General Stat. of N.C. (1981) Ch. 127-A § 127A-1
North Dakota	Const. Art. 11 § 16	N. Dakota Century Code Ann. 1972 § 37-02-01
Ohio	Const. Art. 9 § 1	Baldwin's Ohio Rev. Code Ann. Title 59 ch. 5923 § 5923.01
Oklahoma	Const. Art. 5 § 40 (*LP)	Oklahoma Stat. Ann. Title 44 Art. 3 § 41
Oregon	Const. Art. 10 § 1 (*LP)	Oregon Rev. Stat. (1981) § 396.105
Pennsylvania	*nothing*	Purdon's Penn. Stat. Ann. 1969 Title 51 Art. 2 § 1-201
Rhode Island	*nothing*	General Laws of R.I. Title 30 Ch. 1 § 30-1-2
South Carolina	Const. Art. 13 § 1	Code of Laws of S. Carolina 1976 § 25-1-60
South Dakota	Const. Art. 15 § 1	S. Dakota Codified Laws § 33-2-2
Tennessee	Const. Art. 4 § 1 ('all male citizens shall be subject to performance of military duty as prescribed by law")	Tenn. Code Ann. 1980 § 58-1-104

Texas	Const. of 1876 Art. 16 § 46 (*LP)	Vernon's Texas Civil Stat. Ann. 1962 Title 94 Art. 5766
Utah	Const. Art. 15 § 1	Utah Code Ann. 1981 ed. § 39-1-1
Vermont	Const. Ch. 2 § 55 (*LP)	*nothing*
Virginia	Const. Art. 1 § 13 *nothing*	Code of Virginia 1981 Title 44 § 1
Washington	Const. Art. 10 § 1	Rev. Code of Wash. Ann. 1964 § 38.04.030
West Virginia	*nothing*	West Va. Code 151-13-1 ** *nothing*
Wisconsin	Const. Art. 4 § 28 (*LP)	West's Wisc. Stat. Ann. 1972 § 21.01
Wyoming	Const. Art. 17 § 1	Wyoming Stat. Ann. 1977 § 19-2-102

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* LP constitutional provision for legislature or general assembly to determine organization of militia.

** Code section numbers followed by *"nothing"*—militia section of code contained no specifics on organization.